92-1537

CASE NO.:

Supreme Court, U.S.
FILED
MAR 2- 1993
OFFICE OF THE CLERK

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

IVETTE GONZALEZ,
Petitioner,

v.

THE SALVATION ARMY d/b/a
THE SALVATION ARMY CORRECTIONAL SERVICES
Respondent.

==========

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

==========

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Counsel of Record and
Attorney for Petitioner

March, 1993

QUESTIONS PRESENTED FOR REVIEW

The questions presented by this Petition are:

1. Whether the Hispanic Petitioner was subjected to national origin discrimination by her employer's verbal and written order to speak English only during lunch and break time on his premises.

2. Whether the Petitioner's written "resignation" and circumstances of her leaving Respondent's employ constitute constructive discharge.

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LIST OF ALL PARTIES

The caption of the case in this

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

IVETTE GONZALEZ respectfully petitions this Court for a writ of certiorari to review the opinion and judgment of the United States Court of Appeals for the Eleventh Circuit entered on February 1, 1993 and February 24, 1993 respectively (See Appendix A and C), affirming the judgment of the court below that Petitioner was neither the victim of national origin discrimination nor constructively discharged.

OPINIONS BELOW

The District Court entered its Findings of Fact and Conclusions of Law on May 28, 1991 after a one (1) day trial. Those Findings of Fact and Conclusions of Law are reprinted and attached as Appendix B.

JURISDICTION

This Petition for Writ of Certiorari is filed pursuant to United States Supreme Court Rule 14 to review an opinion and judgment of the Eleventh Circuit Court of Appeals entered February 1, 1993, and February 24, 1993 respectively. This Court has jurisdiction pursuant to 28 USC §2101(f) and United States Supreme Court Rules 10.1(a) and (c).

STATUTE INVOLVED

This case involves Title VII of the Civil Rights Act of 1964 as amended, 42 USC § 2000e et seq.

> **§ 2000e-2. Unlawful employment practices**
>
> (a) It shall be an unlawful employment practice for an employer -
>
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any

individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's .... national origin; or

(2) to limit, segregate, or classify his employees ...in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's ...national origin.

§ 2000e-5. Enforcement Provisions

(3) Each United States district court and each United States court of a place subject to the jurisdiction of the United States shall have jurisdiction of actions brought under this subchapter. Such an action may be brought in any judicial district in the State in which the unlawful employment practice is alleged to have been committed, in the judicial district in which the employment records relevant to such practice are maintained and administered, or in the judicial district in which the aggrieved person would have worked but for the alleged unlawful employment practice, but if the respondent is not found within any such district,

such an action may be brought within the judicial district in which the respondent has his principal office...

(4) It shall be the duty of the chief judge of the district (or in his absence, the acting chief judge) in which the case is pending immediately to designate a judge in such district to hear and determine the case. In the event that no judge in the district is available to hear and determine the case, the chief judge of the district, or the acting chief judge, as the case may be, shall certify this fact to the chief judge of the circuit (or in his absence, the acting chief judge) who shall then designate a district or circuit judge of the circuit to hear and determine the case.

(5) It shall be the duty of the judge designated pursuant to this subsection to assign the case for hearing at the earliest practicable date and to cause the case to be in every way expedited. If such judge has not scheduled the case for trial within one hundred and twenty days after issue has been joined, that judge may appoint a master pursuant to rule 53 of the Federal Rules of Civil Procedure.

(g) If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay (payable by the employer...responsible for the unlawful employment practice), or any other equitable relief as the court deems appropriate. Back pay liability shall not accrue from a date more than two years prior to the filing of a charge with the Commission. Interim earnings or amounts earnable with reasonable diligence by the person or persons discriminated against shall operate to reduce the back pay otherwise allowable. No order of the court shall require the admission or reinstatement, or promotion of an individual as an employee, or the payment to him of any back pay, if such individual was refused admission, suspended, or expelled, or was refused employment or advancement or was suspended or discharged for

any reason other than discrimination on account of... national origin...

(k) In any action or proceeding under this subchapter the court, in its discretion, may allow the prevailing party, other than the Commission or the United States, a reasonable attorney's fee as part of the costs...

STATEMENT OF THE CASE

a. Factual Background

The Salvation Army has contracted with the Florida Department of Corrections to supervise and manage misdemeanor probation within the State. Petitioner, a recent Hispanic arrival from Puerto Rico, was hired by the Salvation Army Correctional Services as a bilingual interpreter/probation counselor in Tampa, Florida on or about January 1986. This was her first full-time job on the mainland. There were a total of sixty (60) employees in the Tampa Office,

including eight (8) Hispanics.

The Salvation Army Tampa office had an officially designated lunch and break area on the premises. All employees were permitted to use this area for two (2) daily fifteen (15) minute breaks and one (1) daily lunch hour. The Hispanics tended to congregate in groups of three and four and speak their native Spanish in this area during the breaks.

b. Unlawful Employment Practice and Constructive Discharge

Two (2) non-Spanish speaking employees, one of whom was the receptionist, complained to management that the lunch and break time speaking of Spanish disturbed them. They did not understand it, but they believed they were "being talked about." One Hispanic misdemeanor probationer overheard the word "condom" during a lunchtime

conversation and was offended. He complained to the receptionist. On or about April 1986, a verbal warning was passed from management to the Hispanics. No more speaking of Spanish during lunch and break times inside the building in the lunch area would be allowed. "English only" would be spoken during the breaks. Violation would result in termination. Petitioner, along with the seven (7) other Hispanics, thought it was a joke. They continued to speak Spanish.

In May 1986, the prohibition was put in writing and characterized as a "final notice". (Appendix D) The letter was addressed individually to each of the eight (8) Hispanics, including Petitioner. Petitioner protested and stated she would not follow this edict. She was told by the Director, Mr. Carroll

E. Hepperle, she would be fired if she did not follow this rule. Five years later at trial, Mr. Hepperle disputed this.

Rather than be fired and "labelled" the rest of her working career, she resigned and specifically noted her reasons for leaving in her letter. (Appendix E) During trial, Petitioner elaborated about the difficulty in remaining on her job in the discriminatory atmosphere. To her, not being permitted to speak her native tongue on her free time was an outrageous demand. The two non-Spanish speaking employees who had prevailed made the Petitioner feel as though her every word spoken was being monitored for a violation of the written edict so that management could fire her if she so much as said "que pasá?" More importantly,

she did not want to be "fired" from her first job on the mainland because it would harm her future employment opportunities.

The Respondent testified at trial that Petitioner's work performance was good and there was nothing negative in her file. Petitioner and Respondent agree that her total money damages are $5,520.00, plus costs and attorney's fees if she prevails.

The jurisdiction of the court below rested upon Title VII of the Civil Rights Act of 1964 as amended 42 U.S.C. § 2000e, et seq. Petitioner properly filed a complaint with the Equal Employment Opportunity Commission which found cause and she was granted a right to sue.

REASONS FOR GRANTING THE WRIT

At trial and appeal, Petitioner relied upon the authority of the Ninth

Circuit holding in Gutierrez v. Municipal Court, 838 F. 2d 1031, (9th Cir., 1988), 861 F. 2d 1187; 104 L. Ed 2d 174, 1989. Neither the Trial Court nor Appellate Court has conceded that Petitioner was discriminated against because of her national origin by the verbal warning and letter forbidding the use of Spanish and requiring the speaking of English only during the breaks in the lunch room. This case appears to fit Supreme Court Rule 10.1(a) requiring review when an appeals court has sanctioned a departure of justice by a lower court, thus calling for the Supreme Court to intervene. Both courts have also found that Petitioner's remaining on the job would not have been "onerous" under a reasonable person's standard, therefore, she was not constructively discharged. Garcia v. Gloor, 618 F. 2d 264 (5th Cir. 1980) and

Stamey v. Southern Bell Telephone and Telegraph Co., 859 F. 2d 855 (11th Cir. 1988), cert. denied sub nom, 490 U.S. 1116 (1989).

Not only does Petitioner disagree with these findings, she also raises the question of being "fired" from one's first job in the United States as being "onerous". Petitioner has a duty to mitigate her damages by seeking equal or better employment. She found better employment and kept her damages to a minimum because she "resigned" and was able to state so in job applications and interviews. The case-law created doctrine of constructive discharge has failed to consider the onerousness of being labeled "fired" and the accompanying label of "troublemaker" which would naturally ensue if a prospective employer learns that a job

applicant had been fired from a previous job for asserting a civil right and refusing to obey a supervisor's order to refrain from a specified activity. Furthermore, the right to speak one's native language during lunch and break time on an employer's premises has never been ruled upon by this Court. Garcia v. Gloor, supra and Supreme Court Rule 10.1(c).

The very narrow facts of this case (i.e. a written, clearly discriminatory edict and a written, specifically qualified "resignation" by an otherwise good employee) should enable the court to fashion a narrow remedy to protect the civil right to speak a chosen language on free time on the employers' premises in a properly designated area. That same ruling can also be written to prevent potential abuse by poorly performing

employees who resign to prevent their being "fired", then falsely assert Civil Rights claims to mask their performance deficiencies.

WHEREFORE, Petitioner respectfully requests this court to grant this Petition and review the decision below on its merits.

Respectfully submitted,

JOSEPH EPISCOPO, Esquire
Attorney for Petitioner

March, 1993

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 91-3588

D.C. Docket No. 89-1679-CIV-T-17(B)

IVETTE GONZALEZ,

Plaintiff-Appellant,

versus

THE SALVATION ARMY, d/b/a THE SALVATION ARMY CORRECTIONAL SERVICES,

Defendant-Appellee.

Appeal from the United States District Court for the Middle District of Florida

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(February 1, 1993)

Before HATCHETT, Circuit Judge, HENDERSON and ESCHBACH*, Senior Circuit Judges.

PER CURIAM:

We affirm the district court because the appellant failed to prove that her

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*Honorable Jesse E. Eschbach, Senior U.S. Circuit Judge for the Seventh Circuit, sitting by designation.

employer constructively discharged her. Stamey v. Southern Bell Telephone and Telegraph Co., 859 F.2d 855 (11th Cir. 1988), cert. denied sub nom, 490 U.S. 1116 (1989).

AFFIRMED

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

IVETTE GONZALEZ

Plaintiff,

CASE NO.: 89-1679-Civ-T-17

vs.

THE SALVATION ARMY
et al.,

Defendant.

FINDINGS OF FACT & CONCLUSIONS OF LAW

This matter came on for trial before the Court. Based upon the testimony of the witnesses and other evidence in the record, the Court enters the followings findings of facts and conclusions of law:

FINDINGS OF FACT

1. The Salvation Army Correctional Services is a not-for-profit service organization operated by The Salvation Army which is engaged in the provision of counseling and supervision for individuals

placed on probation by the state court system. The main duties of the staff are to monitor the probationers' compliance with court-ordered community service requirements and to collect any payments of fines imposed by the Court.

2. At all times pertinent to this action, the Correctional Services operated out of an office located on North Florida Avenue in Tampa, Florida. During this time, in early 1986, The Salvation Army employed approximately sixty (60) individuals at this facility. The layout of this facility is set forth in a drawing admitted into evidence as Defendant's Exhibit Number 1.

3. On January 15, 1986, Plaintiff Ivette Gonzalez applied for the position of Probation Counselor with the Salvation Army. The Salvation Army was specifically seeking an individual who spoke Spanish to

communicate with probationers who could speak only Spanish. The individual was also required to speak English to communicate with the English speaking clients which make up a majority of the clientele. Plaintiff had taught English and Spanish for eleven years and was proficient in English and Spanish.

4. As a result of Plaintiff's bilingual language capabilities, Carroll E. Hepperle, the Director of The Salvation Army Correctional Services, hired Plaintiff for the counseling position. At the time of Plaintiff's employment, The Salvation Army employed eight (8) employees of Hispanic background. Of the supervisory level employees only Victor Perez could understand or speak Spanish.

5. Plaintiff began employment on January 29, 1986, and, as all probation counselors, was paid for an eight hour

day. The eight hour day began when an employee arrived at work and ended when the employee left in the afternoon. Although each employee is given an hour for lunch, and two breaks, this time is not deducted from their compensated time. If an employee was present for more than eight hours, overtime compensation was paid without deletion of the break or lunch periods.

6. The Salvation Army did not require the employees to remain within the facility during break or lunch time. Employees who smoke often take their break outside the facility. Similarly, employees are free to take their lunch breaks wherever they desire, either on or off the premises.

7. An area within the office where employees often took their breaks and lunch periods was the conference area

located at the top of Defendants Exhibit Number 1. The conference area contained two tables in the middle and was surrounded by file cabinets containing the probationer files. The tables in the area were used for staff meetings and by employees who accessed the file cabinets throughout the day. The integrated and multipurpose use of the conference area was necessitated by lack of space within the building. The Salvation Army has since moved to a much larger facility.

8. To the right of the conference area was a typing pool where three typists worked. Employees working the in the typing area could hear conversations at the conference table. To the south of the conference area was a reception area where probationers sat while waiting for their counseling sessions. Talk within the conference area could be overheard in the

reception area.

9. Director Hepperle received complaints from the non-Spanish speaking employees that conversations by the employees in the conference area in Spanish made them feel uncomfortable. These non-Spanish speaking employees informed Hepperle that they felt certain conversations were about them, but were unsure what the actual content was. Hepperle observed that this practice was creating a morale problem among the non-Spanish speaking staff.

10. Hepperle also received a report from the receptionist, Roberta Lowe, that a client had complained regarding a conversation in Spanish pertaining to condoms. Plaintiff was among the Spanish speaking employees engaged in such a conversation. The client felt the conversation was unprofessional. Hepperle

could not understand Spanish and became concerned with his inability to monitor conversations that could be overheard by the clients and co-workers.

11. As a result of the morale problem among the non-Spanish speaking staff and the implications of the reported incident, Hepperle requested that the Spanish speaking employees speak only English within the conference area. The policy would allow Hepperle, whose office was next to the conference area, to supervise conversations that could be overheard by the clients and staff.

12. Hepperle asked Plaintiff's supervisor, Victor Perez, to request to Plaintiff, as well as other Spanish speaking employees, refrain from conversing in Spanish in the conference area except when communicating with Spanish speaking clients. Perez informed

Plaintiff that co-employees were having their feelings hurt. Despite Hepperle's request, the practice of speaking Spanish within the office during the workday continued.

13. Thereafter, Hepperle wrote a letter to the Spanish speaking employees dated April 28, 1986, formally requesting that conversations in the conference area of the office by only in English. The letter referenced both the incident with the client and the morale problem associated with the employees having their feelings hurt.

14. Plaintiff continued to speak Spanish in the conference area. Thereafter, Plaintiff approached Hepperle and complained about the nature of his request. Plaintiff then told Hepperle of her displeasure with the policy and declared she would not obey it. Hepperle

did not terminate Plaintiff as a result of this conversation, but he indicated that additional steps would be taken if the policy was violated. Plaintiff did not come to work the next day and on May 9, 1986, delivered her letter of resignation. The Plaintiff could have continued working for the Defendant had she complied with the "English-only" rule. The Defendant announced the rule based upon business needs and not out of any desire to force the Plaintiff to resign or to discriminate against Hispanic employees.

15. Plaintiff filed a national origin discrimination charge with the EEOC and otherwise complied with all procedural requirements for filing a Title VII lawsuit. Other than the "English-only" rule, and the discussions surrounding it, Gonzalez points to no other evidence to support a claim of discrimination or that

the rule was construed as a pretext to cover a discriminatory motive.

CONCLUSIONS OF LAW

1. The Court has jurisdiction over the parties and the subject matter of this action and all procedural requires (sic) for a claim under Title VII of the Civil Rights Act of 1964.

2. The enactment of the "English-only" rule by the Defendant served legitimate business purposes, including:

(a) Providing the Defendant's English speaking supervisors with the ability to manage the enterprise by knowing what was said in a work area of the Defendant's enterprise;

(b) Providing Defendant's non-Spanish speaking employees the ability to understand what was being said within hearing

distance of such employees and the probationers conducting business with the Defendant's employees.

3. The Defendant was motivated exclusively by such legitimate business reasons when enacting the rule and was not motivated by any desire to discriminate against, single out, or harass Spanish speaking employees.

4. The enforcement of an English-only rule on an employer's premises under circumstances where co-employees who are working or customers who visit the employer's establishment for business purposes can overhear conversations is not a violation of Title VII of the Civil Rights Act of 1964 as applied to a person, such as the Plaintiff, who has the ability to speak English. Garcia v. Gloor, 618 Fed. 2d 264 (CA 5 1980) cert. denied 499

U.S. 1113 (1981).

5. The Plaintiff presented no practice by the Defendant which was alleged to be discriminatory other than the English-only rule.

6. Even had the Defendant's rule been in violation of Title VII of the Civil Rights Act of 1964, the Plaintiff could not prevail by a claim of "constructive discharge."

Dated this 28th day of May, 1991.

/s/
DISTRICT JUDGE
HOWARD B. TURRENTINE

Copies to:
William E. Sizemore
Joe Episcopo

UNITED STATE COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 91-3588

District Court Docket No. 89-1679-CIV-T-17

IVETTE GONZALEZ,

Plaintiff-Appellant,

versus

THE SALVATION ARMY, d/b/a
THE SALVATION ARMY CORRECTIONAL
SERVICES,

Defendant-Appellee.

Appeal from the United States District Court for the Middle District of Florida

---

Before HATCHETT, Circuit Judge, HENDERSON and ESCHBACH**

J U D G M E N T

This cause came to be heard on the transcript of the record from the United States District Court for the Middle District of Florida, and was argued by counsel;

UPON CONSIDERATION WHEREOF, it is now hereby ordered and adjudged by this Court

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**Honorable Jesse E. Eschbach, Senior U.S. Circuit Judge for the Seventh Circuit, sitting by designation.

that the judgment of the said District Court in this cause be and the same is hereby AFFIRMED;

IT IF FURTHER ORDERED THAT plaintiff-appellant pay to defendant-appellee, the costs on appeal to be taxed by the Clerk of this Court.

Entered: February 1, 1993
For the Court: Miguel J. Cortez, Clerk

/s/
Deputy Clerk

ISSUED AS MANDATE: February 24, 1993

Jarl Wahlstrom
GENERAL

Commissioner Andrew S. Miller
TERRITORIAL COMMANDER

THE SALVATION ARMY CORRECTIONAL SERVICES
HILLSBOROUGH COUNTY
1514 N. Florida Avenue
Phone 223-3781
Tampa, Florida 33602

Lt. Colonel Harold D. Hinson
Divisional Commander

Captain Jack O. Repass
Commanding Officer

Mr. Carroll E. Hepperle
DIRECTOR

April 28, 1986

Mrs. Ivette Gonzalez
1514 N. Florida Avenue
Tampa, FL 33602

Dear Mrs. Gonzalez,

It has been brought to my attention from a couple of our Spanish speaking clients and others that understand some spanish that some very untasteful conversations have been over heard from some of our spanish employees.

You have been asked on occasion that you speak english in the office, other then when dealing with a spanish client. I must ask that you keep all conversation in the break area and for lunch in english.

Several employees have come to me and said

that they get their feelings hurt when all around them all they hear is spanish and they get the feeling that they are being talked about.

I would hope that you understand, as an example I would like to say that if we had two or three employees that spoke french and you overheard them what you think they were talking about and how would you feel?

It is hoped that this letter will serve as final notice "English" is requested in the office, except when seeing a spanish client.

If you have any questions please do not hesitate to see me.

Sincerely,

/s/

Mr. Carroll E. Hepperle
Director

CEH/mlw

cc: Personal (sic) File

Mr. Carrol E. Hepperle
The Salvation Army Correctional Services
1514 N. Florida Avenue
Tampa, Florida 33602

Re: Ivette Gonzalez
Letter dated April 28, 1986

Dear Mr. Hepperle:

I am responding in reference to your letter dated May 5, 1986 and also to your requested office conference.

The only problem that you have stated that I have is that "I Speak Spanish" on the break and lunch time in the office. At this time, I am sorry to let you know that I am not going to be able to comply with your request because I feel I have the right to talk Spanish on my free time. I feel that you have violated my human rights and I also feel descriminated (sic) at the same time. When you hired me, you know that I was a (sic) Spanish speaking origin. It is good to talk Spanish in the office at your convenience which I do with my Spanish speaking clients.....but not on my free time. I do not understand the difference.

I feel sorry for the people under the same situation - they feel like I feel, and even though their rights are being violated, they keep on working with you because they do need their job security. I like and need my job but I feel I do not have to be humiliated and descriminated (sic) at the same time.

You told me if I did not comply with your request, you were going to replace me. Under the above mentioned circunstance (sic) and not being able to comply with your request, I have no choice but to resign my position as of this date, May 9, 1986.

Sincerely yours,

/s/

Ivette Gonzalez
Probation Officer